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No. 92-878

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

AMERINET, INC., d/b/a AMERINET/GENESIS, AND KAIBAB NATIONAL GROUP, INC., d/b/a GENESIS SYSTEMS CORPORATION

Petitioners,

vs.

XEROX CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners failed to present evidence which, when tested against the undisputed standards of law applicable under Federal Rule of Civil Procedure 50(b), was sufficient to withstand a motion for judgment notwithstanding the verdict on a state law intentional interference claim.

2. Whether Petitioners failed to present evidence which, when tested against the undisputed standards of law applicable under Federal Rule of Civil Procedure 56, was sufficient to withstand a motion for summary judgment on state law business disparagement and federal antitrust claims.

LIST OF SUBSIDIARY COMPANIES

Pursuant to Supreme Court Rule 29.1, respondent Xerox Corporation provides the following list of its subsidiary companies. This list does not include wholly-owned subsidiaries, or wholly-owned subsidiaries of subsidiaries.

AMTX, Inc.
J.D.R. Equipamentos Vitoria S.A.
Xerox do Nordeste S.A.
Xerox do Amazonas S.A.
Century Data Systems, Inc.
Chapman Instruments, Inc.
Copicentro S.A.
Cortex Corp.
GESCAN International
Image Sciences, Inc.
Intelligent Business Systems
Interfax
Katun Corporation
Kurzweil Applied Intelligence
Optimem
Opto Generic Devices, Inc.
ParcPlace Systems, Inc.
Protocol Engines, Inc.
QuadMark, Ltd.
Rank Xerox Holding B.V.
Rank Xerox Investments Limited
Investissements Xerographiques Marocains S.A.
Reprographics Egypt Limited
Xerox Egypt S.A.E.
Xerox Maroc S.A.
Xerox Products Limited
R-X Holdings Limited
Xerox Shanghai Limited
Rank Xerox Limited

Fuji Xerox Co., Ltd.
Aichi Xerox Co., Ltd.
Aichi-Higashi Xerox Co., Ltd.
Akita Xerox Co., Ltd.
Ariadne Language Link Co., Ltd.
Chiba Xerox Co., Ltd.
Fuji System Brain Co. Ltd.
Fukui Xerox Co., Ltd.
Fukuoka Xerox Co., Ltd.
Fukushima Xerox Co., Ltd.
Gunma Xerox Co., Ltd.
Hiroshima Xerox Co., Ltd.
Hokkaido Xerox Co., Ltd.
Hokuriku Xerox Co., Ltd.
Hyogo Xerox Co., Ltd.
Kagoshima Xerox Co., Ltd.
Kanagawa Xerox Co., Ltd.
Kita Kyushu Xerox Co., Ltd.
K-O-A Co., Ltd.
Korea Xerox Company Limited
Kumamoto Xerox Co., Ltd.
Kyoto Xerox Co., Ltd.
M-I-C Co., Ltd.
Mie Xerox Co., Ltd.
Miyagi Network Inc.
Miyagi Xerox Co., Ltd.
Nagano Xerox Co., Ltd.
Nagasaki Xerox Co., Ltd.
Niigata Xerox Co., Ltd.
NTT Learning Systems Corp.
Okayama Xerox Co., Ltd.
Oita Xerox Co. Ltd.
Okinawa Xerox Co. Ltd.
Osaka Xerox Co., Ltd.
Philipine Fuji Xerox Corporation
Protex Co. Ltd.
Saitama Xerox Co., Ltd.

Shikoku Xerox Co., Ltd.
Shizuoka Xerox Co., Ltd.
SOAR Co., Ltd.
Sogetsu Art Planning Co., Ltd.
Taiwan Fuji Xerox Corporation
Tama Xerox Co., Ltd.
Techno Front Co., Ltd.
Technol Co. Ltd.
Thai Xerographic Systems Co., Ltd.
Tochigi Xerox Co., Ltd.
Tokyo Xerox Co., Ltd.
Unisol Inc.
Wakayama Xerox Co. Ltd.
Yamagata Xerox Co., Ltd.
Indian Xerographic Systems Limited
Modi Xerox Limited
Burotic Business S.A.
Burotic 2000 S.A.
Euro Burotic S.A.
D&B Partners S.A.
Business Office Products S.A.
Epitec AB
Johan Nyberg Forsaljningsakteibolag
Treitner
Arguelles
Bonanova
Cantabria
Castellon
Castilla Y La Rioja
Cia. Espanola Reprografia y Servicios SA
Almerica SA
Castellana SA
Costa del Sol
Henares SA
C.L.I.A. S.A.
Ciudad Lineal
Cuzco

Del Guadalquivir
Deusto
Ebro
Helmantica
Layetana
Les Corts
Levante
Llobregat
Los Remedios
Madrid-Sur
Malaga
Mediterraneo
Meridiana
Mestalla
Nervion
Retiro
Salamanca
Sistemas Expertas y Tecnolo.
Vizcaya
Scaitech A/S
Xerox Partner Arhus A/S
Xerox Partner Esbjerg A/S
Xerox Partner Fyn A/S
Xerox Partner Herning A/S
Xerox Partner Horsholm A/S
Xerox Partner Nykobing A/S
Xerox Partner Trommesalen A/S
Xerox Partner Vejle A/S
Asunto Oy Kristiinanvalli
Kaakon X-Partner Oy
X-Partner Jyvaskyla Oy
X-Partner Kuopio Oy
X-Partner Oulu Oy
X-Partner Turku Oy
X-Partner Tampere Oy
Rank Xerox (Nigeria) Limited
CEMEX

Artificial Intelligence Limited
Badger Office Equipment
Channel Office Systems Limited
Coles Office Equipment Limited
Humberside Business Products Limited
Kernal Technology Limited
Oakley Office Equipment Limited
SBS Ltd.
Sussex Office Services Limited
Text-Comm Limited
AZA
ACT Systemes S.A.
AGORA S.A.
A.J.P. S.A.
Aqix Sarl
Aquitaine Docutique Systemes
Ardennes Marne Bureatique
Axes Bureautiques Systemes
Axor Bureautique
BSC Arve
Bureau Equip'Mans
Bureautique 64
Bureautique 66
Bureautique Distribution
Burobail S.A.
Burocom 42
Burofinance S.A.
C2B Cazaban
C2R Bureautique
CBC
Centre Bureautique 49
Centre Bureautique Auvergne
Centre Bureautique Informatique
C K Bureautique
Competence Bureautique
Diffusion Bureautique de la Somme
DOC X TECH

DOCUSYS SA
Espace Bureautique
Espace Document
Franche Comte Bureautique
HLB Document
Informatique Bureautique Charente
Informel Sarl
L. A. Bureautique
Nimes Bureautique Communication
RSL Developpement SARL
Omicrome S.A.
Pays d'Auge Bureau
Repro Partner
SRE Societe de Reprographic Electronique
Secob
Sodevco
Vaucluse Bureautique Service
Vienne Partenaire Bureautique
Xeroboutique
Selectronics, Inc.
Softstrip, Inc.
Spectra Diode Laboratories, Inc.
SPECTRA, Inc.
Superconductivity, Inc.
The Genmoora Corporation
UltraFine Power Technology, Inc.
Verbex Voice Systems, Inc.
Xerox de Bolivia Limitada
Xerox Canada Inc.
Xerox Canada Ltd.
Xerox de Colombia S.A.
Xerox de El Salvador, S.A. de C.V.
Fintrend S.A.
Duff & Phelps/MCM Investment Research Co.
Xerox Financial Services Life Insurance Company
Xerox de Honduras, S.A.
Avalanche Development Company

Xerox Canada Realty, Inc.
Xerox (Jamaica) Limited
Xerox de Panama, S.A.
Xerox del Peru, S.A.
Xerox Trinidad Limited
Xerox de Venezuela, C.A.
Xerox Zona Libre, S.A.

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BRIEF IN OPPOSITION

Respondent Xerox Corporation ("Xerox") submits this brief in opposition to the request of Petitioners (collectively "Amerinet") that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit. The petition should be denied.

STATEMENT OF THE CASE

The unanimous opinion of the Court of Appeals, *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483 (8th Cir. 1992), contains a detailed statement of the facts and procedural history of this case at pages 1487-9, which Xerox adopts for purposes of this brief. In summary, Amerinet began selling used computer equipment in 1980. 972 F.2d at 1488. It was struggling financially as early as 1985. 972 F.2d at 1495. Amerinet did not begin trying to sell used high-speed Xerox laser printers until October 1986, 972 F.2d at 1488, 1492, when it bought an off-the-shelf list of laser printer users and began "cold-calling" them in hopes of finding a match between the equipment one user wanted to sell and another user wanted to buy. A. 1007.1/ If Amerinet found a match, it would try to act as a middleman in the transaction. *Id.*; A. 764. By May 1987, when Amerinet stopped even trying to sell used Xerox laser printers, it had made only two sales. 972 F.2d at 1488. Amerinet continued selling other types of used computer equipment for more than a year, until it went out of business in November 1988. *Id.*

Pursuant to Supreme Court Rule 15.1, Xerox draws the Court's attention to certain of the errors and omissions in Amerinet's Statement of the Case. First, Amerinet complains that three of the January 1, 1987 amendments to Xerox' Full Service Maintenance Agreement ("FSMA") "had no legitimate business purpose." Petition at 12. The record is to the contrary; each satisfied a legitimate business need.

1/ "A." refers to the Appendix Xerox filed in the Court of Appeals. "X.S." refers to the Supplemental Appendix Xerox filed in the Court of Appeals.

Under the FSMA, Xerox agreed, for a fixed annual payment, to keep the customer's laser printer in good working order and, if necessary, to replace it with new equipment. A. 1169-72. Since the cost of replacing equipment is substantial, Xerox assumed a significant financial risk under the FSMA. The first amendment provided that the period of assured availability of full service maintenance remained with the original title holder and was not transferable.2/ The second amendment clarified that after the period of assured availability had expired, Xerox would offer full service maintenance on a year-to-year basis and not raise the annual fee by more than 10% per year. The third amendment provided that on expiration of the period of assured availability, Xerox would inspect the equipment and give the owner a written estimate of the cost, if any, to bring the machine up to the condition necessary to qualify for full service maintenance for another year. The purpose of these amendments was to eliminate the substantial costs Xerox had incurred when buyers of used equipment demanded full service maintenance on equipment that was in extremely poor condition and required extensive repairs before operating properly. A. 1019; A. 1037-40; A. 1041-2; A. 1170-2; A. 1179-80; A. 1189-90.

Second, Amerinet glosses over the fact that *not a single one* of its alleged "prospective customers" testified that any conduct on the part of Xerox caused the prospective customer not to do business with Amerinet. Amerinet conducted extensive discovery and deposed employees of three of its alleged prospective customers – Massachusetts Mutual Insurance Company ("Mass.

2/ Xerox assured that maintenance on its laser printers would be available for a period of at least seven years after the equipment was initially installed.

Mutual"), New York Life Insurance Company ("New York Life"), and Meijer Corporation ("Meijer"). Amerinet failed, however, at summary judgment and at trial, to provide any evidence from these or any other alleged prospective customers that Xerox had proximately caused Amerinet to lose any business. In fact, the evidence presented at trial was to the contrary. 972 F.2d at 1501, *quoting* A. 1046-47. Amerinet's trial counsel candidly admitted that after two years of searching, he could not find a single customer who would say that Xerox had been a deterrent to doing business with Amerinet. A. 944.

Third, Amerinet's claim that the verdict below can be supported on evidence of lost profits -- particularly on evidence of lost profits from sales of non-Xerox equipment to Meijer -- is not properly before the Court. Amerinet expressly waived any claim for lost profits and proceeded to trial solely on a "business destruction" theory. Amerinet's trial counsel expressly told the jury, in his opening statement, that "we're not asking for lost profits." X.S. 80. And Amerinet's damages expert testified that the loss of sales of Xerox printers was the only reason for destruction of the business. 972 F.2d at 1495, n.18. When, during trial, Xerox objected to evidence of lost sales of non-Xerox equipment to Meijer, Amerinet's trial counsel assured the District Court that the evidence was being offered only to show "what the condition of the company was in the 1987 and 1988 time frame. . . ." and that "I'm not introducing [evidence of lost non-Xerox sales to Meijer] to show the amount of damages." X.S. 103. The argument raised for the first time in the Court of Appeals that the jury could base its verdict on evidence of lost profits instead of business destruction was expressly waived at trial and is not properly before the Court. *See City of Springfield v. Kibbe*, 480 U.S. 257, 258-9 (1987).

REASONS FOR DENYING THE PETITION

Amerinet asks this Court to exercise its supervisory power to reconsider the Court of Appeals' decision that, with respect to the tortious interference claim, Amerinet presented insufficient evidence to withstand a motion for judgment notwithstanding the verdict (now motion for judgment as a matter of law) under Federal Rule of Civil Procedure 50(b), and that with respect to the business disparagement and federal antitrust claims, Amerinet presented insufficient evidence to withstand a motion for summary judgment under Federal Rule of Civil Procedure 56.

In seeking review by this Court, Amerinet:

- does not contend that the Court of Appeals' decision is in conflict with the decision of another United States Court of Appeals;

- does not contend that the Court of Appeals decided a federal question in a way that conflicts with the applicable decisions of this Court;

- does not contend that the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court;

- does not contend that the Court of Appeals applied an incorrect legal standard;

- does not contend that this Court should change the law applicable to motions for summary judgment or judgment notwithstanding the verdict;

- does not contend that the Court of Appeals erred in determining the law applicable to Amerinet's Minnesota tort claims; and

- does not contend that any such law is unconstitutional.

This case does not require an exercise of the Court's supervisory powers. The Court's intervention here is not necessary to protect the integrity of the federal system, *see Frazier v. Heebe*, 482 U.S. 641, 647-8, n.7 (1987), or to ensure that the judiciary functions properly, *see Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 809 (1987). Amerinet has not identified any conduct by the Court of Appeals that would endanger the integrity of the federal system or the proper functioning of the judiciary. Amerinet does not complain of any fundamental unfairness in the proceedings below; it just disagrees with the Court of Appeals' ruling on the sufficiency of the evidence.

This case simply does not present any issues that require Supreme Court review. The only question presented is whether Amerinet's evidence was sufficient in light of the undisputed legal standards. The decision of that question, which is inextricably bound to the particular circumstances here, would have no significant implications beyond this case. Amerinet's petition should be denied.

I.

THE COURT OF APPEALS, IN APPLYING THE UNDISPUTED STANDARDS FOR JUDGMENT NOTWITHSTANDING THE VERDICT TO THE RECORD IN THIS CASE, DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Amerinet concedes that the Court of Appeals applied the correct legal standards to Xerox' motion for judgment notwithstanding the verdict. Amerinet's description of the applicable law tracks precisely the law applied by the Court of Appeals. The parties and the Court of Appeals are in agreement that the governing law was stated in *Northside Mercury Sales & Service, Inc. v. Ford Motor Co.*, 871 F.2d 758, 760 (8th Cir. 1989); *City of Omaha Employees Betterment Ass'n v. City of Omaha*, 883 F.2d 650, 651 (8th Cir. 1989); and *Hughes v. Sinclair Marketing, Inc.*, 389 N.W.2d 194, 198 (Minn. 1986). *See* Petition at 27-29.

After conducting a detailed analysis of the record in this case, the Court of Appeals unanimously concluded that Xerox was entitled to judgment notwithstanding the verdict on Amerinet's Minnesota law claim of tortious interference because Amerinet's evidence at trial:

1) was insufficient to support a jury finding that Xerox used "wrongful means" of competition;

2) was insufficient to support a jury finding that Xerox' alleged conduct destroyed Amerinet's business; and

3) was insufficient to support a jury finding of the amount of damages allegedly suffered.

Amerinet has failed to show how any of these rulings constitutes a departure from "the accepted and usual course of judicial proceedings." Supreme Court Rule 10.1(a). Each of these rulings is discussed in turn.

A. The Insufficiency of Evidence of Wrongful Means

Amerinet concedes that under the applicable Minnesota law, it had the burden of showing at trial that Xerox' actions fell outside the "competitor's privilege." Petition at 29. To meet this burden, Amerinet was required to show that Xerox used "wrongful means" of competition. Under Minnesota law, "wrongful means" refers to conduct that is independently actionable -- "conduct which is itself capable of forming the basis for liability of the actor." 972 F.2d at 1507 (citations omitted).

At trial, Amerinet presented no evidence of conduct by Xerox that was independently actionable. In the Court of Appeals, for the first time, Amerinet argued that Xerox had engaged in independently actionable conduct amounting to breach of contract, fraud, and misrepresentation. Because Amerinet did not make this argument at trial, it was waived and was not properly before the Court of Appeals or this Court. *See City of Springfield v. Kibbe*, 480 U.S. 257, 258-9 (1987). Nevertheless, the Court of Appeals considered the argument and found that Amerinet had not presented evidence sufficient to support a jury finding of breach of contract, fraud, or misrepresentation.

Amerinet was unable to point to any evidence to support its claim that Xerox had entered into and breached some oral contract with Amerinet to deliver parts to Meijer. As its sole support for this claim, Amerinet cited the testimony of its owner, Mr. Brandsey, that: "[I]t was our understanding that the normal time for delivery is two to four weeks. . . . And it took us almost 90 days, I understand, just about 90 days, to get the parts

delivered to us. . . ." 972 F.2d at 1507. The Court of Appeals found that this statement -- lacking any reference to offer, acceptance, or the terms of the purported contract -- "simply does not form the basis for a reasonable inference that Xerox had entered into, much less breached, a contract . . . and does not show misrepresentation or fraud." *Id.*

Amerinet's attempts to find support for its argument of fraud and misrepresentation were equally unsuccessful. Amerinet claimed in the Court of Appeals that there was fraud or misrepresentation in Xerox' alleged statements to the third parties (Mass. Mutual, New York Life, and Meijer) for whose business Amerinet and Xerox were competing. Petition at 31. Amerinet also tried to claim that the January 1, 1987 amendments to the FSMA somehow constituted a misrepresentation. None of these claims had any support in the record (nor were such claims made at trial).

The Court of Appeals found that even if one assumed, for the sake of argument, that there had been evidence sufficient to support an inference that Xerox had made material misrepresentations, there was still no evidence that anyone had relied on the alleged misrepresentations or that Amerinet had in any way been harmed as a result. 972 F.2d at 1507-8. No employee of Mass. Mutual, New York Life, or Meijer testified that any statement by Xerox caused these companies not to do business with Amerinet.[3/] Nor was there any evidence that the FSMA

3/ At trial, Amerinet read deposition testimony from employees of Mass. Mutual and Meijer, but presented no testimony from employees of New York Life. Amerinet had, however, presented some deposition testimony from New York Life employees at the summary judgment stage. For convenience, we discuss in this section the testimony of employees of all three companies.

had caused any of these companies not to do business with Amerinet. In fact, the only testimony on this point is completely contrary to Amerinet's theory. William Fortier, an employee of Mass. Mutual, testified that despite the January 1, 1987 amendments to the FSMA, Mass. Mutual still "could realistically have purchased" a used Xerox laser printer from Amerinet. 972 F.2d at 1501, *quoting* A. 1046-7.

Amerinet's petition fails to show how the Court of Appeals' ruling on the sufficiency of the evidence was a departure from the accepted and usual course of judicial proceedings. Amerinet had a full opportunity to argue its case to the Court of Appeals, and to cite all the evidence it believed to be relevant. The Court of Appeals opinion reveals that the court carefully considered all of Amerinet's arguments and and its citations to the record. While Amerinet claims that the Court of Appeals "ignored evidence," Petition at 34, Amerinet fails to identify what evidence was purportedly ignored, or how that evidence could support a finding of "wrongful means."

Amerinet's assertion that the Court of Appeals "assumed the role of trier of fact" is without merit. The Court of Appeals concluded that "Amerinet did not adduce sufficient evidence at trial to allow a reasonable jury to find that Xerox used wrongful means and thus acted outside the scope of the competitor's privilege." 972 F.2d at 1508. This is precisely the inquiry with which the Court of Appeals was charged. The Court of Appeals did not depart from its proper function.

B. The Insufficiency of Evidence of Causation

Under the applicable Minnesota law, as to which there is no dispute, Amerinet had the burden of proving that *but for* the allegedly wrongful conduct of Xerox, Amerinet would not have suffered its alleged injury. Amerinet argued two theories of injury in the Court of Appeals. First, Amerinet claimed that Xerox' conduct caused Amerinet to lose prospective sales of used Xerox laser printers and that Amerinet's business was destroyed as a result. Second, Amerinet claimed that Xerox' conduct caused Amerinet to lose sales of non-Xerox equipment to Meijer.

After a careful review of the evidence, the Court of Appeals found that there was no showing that Xerox' alleged conduct had caused the destruction of Amerinet's business. Amerinet's problem was twofold. First, Amerinet failed to demonstrate by direct evidence a link between the allegedly wrongful conduct of Xerox and any lost sales of Xerox laser printers. Not a single customer testified that it was deterred by Xerox' conduct from buying a used Xerox laser printer -- or any non-Xerox equipment -- from Amerinet, despite Amerinet's two year search to find such a customer. *See* discussion above, Section I-A.

Second, Amerinet failed to adduce evidence from which a jury could reasonably infer that its business was destroyed by Xerox' alleged conduct. The only customer who addressed that issue at trial stated that nothing Xerox said or did deterred him from purchasing a used Xerox laser printer from Amerinet. 972 F.2d at 1501, *quoting* A. 1046-7. The Court of Appeals also noted Amerinet's failure to account for the impact of the various other factors, unrelated to anything Xerox allegedly did, that caused Amerinet's demise. It was undisputed at trial (and at summary judgment) that Amerinet was in the throes

of economic collapse long before any allegedly wrongful conduct on the part of Xerox. Market forces were a critical factor in Amerinet's demise. According to the uncontradicted testimony of Amerinet's own witnesses, Amerinet was suffering the devastating effects of increasing competition and decreasing profit margins from as early as 1985. 972 F.2d at 1495; A. 761-2; A. 771-2; A. 925-6. As a result of shrinking profit margins, analyses performed by Amerinet's own "expert" showed that despite an increase in sales, Amerinet's pretax income fell from 5.5% of sales in fiscal year 1984, to just 1.6% of sales in fiscal year 1986. A. 1126-7. In the last four months of 1986, Amerinet lost $107,000. A. 1127.

In addition to the impact of market forces, Amerinet was beset by a series of internal and external misfortunes. In late 1986 or early 1987, the crucial time period for this lawsuit, several key members of Amerinet's sales force defected to form a company in direct competition with Amerinet. In June 1987, one month *after* suing Xerox, Amerinet sued these defectors, claiming that they caused Amerinet to suffer substantial harm. 972 F.2d at 1496. Also in June 1987, Amerinet claimed that one of its suppliers had breached a contract with Amerinet, and caused Amerinet damages of up to $100,000 -- double Amerinet's pretax profit for the prior year. 972 F.2d at 1508. In the face of the uncontradicted evidence that these other factors were adversely affecting Amerinet, and in the absence of any evidence that any Xerox statement or policy caused Amerinet's decline, a jury could not reasonably infer that Xerox' alleged conduct destroyed Amerinet's business. *See Polaris Industries v. Plastics, Inc.*, 299 N.W.2d 414, 418-19 (Minn. 1980).

The Court of Appeals determined that the evidence was insufficient to support Amerinet's business destruction theory of causation. The Court of Appeals was correct. There was no departure from the accepted

and usual course of judicial proceedings such as to require this Court's supervision.

C. The Insufficiency of Evidence of Damages

Amerinet does not contend that the Court of Appeals failed to apply the correct Minnesota law with respect to proof of damages. Rather, Amerinet simply disagrees with the Court of Appeals' decision that Amerinet's proof was insufficient.

Amerinet argued both a business destruction theory and, for the first time in the Court of Appeals, a lost profits theory. Under the business destruction theory, Amerinet did not simply seek to recover the value of the business that was allegedly destroyed in May 1987. Amerinet argued, rather, that but for Xerox' conduct Amerinet would have had a spectacular future selling used Xerox laser printers, and would have made astronomical (and unprecedented) profits from these sales. Then, with the extraordinary profits from its new business selling used laser printers, Amerinet would have capitalized a second, entirely new business as a Value Added Remarketer of I.B.M. equipment. This second new business, according to Amerinet's theory, also would have been wildly successful. Amerinet's damage figure was based on the price at which this hypothetical business would be sold in 1992, five years after the alleged tort. A. 1092; A. 1227-8.

The Court of Appeals found that Amerinet's business destruction theory was hopelessly speculative -- "fairy-tale-like." 972 F.2d at 1510.4/ Amerinet's theory was based on projections of extraordinary and unprecedented future profits from not one, but two, new businesses. The Court of Appeals noted that under Minnesota law proof of lost profits in a new business is generally too speculative to support a recovery in tort. 972 F.2d at 1510; *Village of Elbow Lake v. Otter Tail Power Co.*, 160 N.W.2d 571, 574 (1968). There must be a reasonable basis upon which to approximate the amount of damages. Without a "history of profits, new businesses rarely have evidence upon which an award of damages may be based with the requisite degree of certainty." *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977). In this case, Amerinet had no such established history in either of these businesses. In the absence of any sort of profit history, the only basis for Amerinet's damage scenario was speculation.

In the Court of Appeals, Amerinet argued that the jury's verdict could be based on the theory that Xerox had caused Amerinet to lose sales of non-Xerox equipment to

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4/ The basis for that finding is clear when the forecasts of Amerinet's damage expert, Mr. I. Jeff Litvak, are compared to the facts. Mr. Litvak forecasted: sales of thirty Xerox machines in 1987, as opposed to two actually sold in 1986; sales revenues on Xerox printers of $8,250,000 in 1987, as opposed to $433,000 actually achieved in 1986 (the $8,250,000 forecast, exceeding in one year, Amerinet's total revenue for its entire prior existence); a 336% increase in total revenue in 1987 over 1986; a reduction in expenses to 11.6% of revenue, less than half of its best prior performance; and a pre-tax profit of over $1,000,000 in 1992, resulting in an increase over 1986 actual of 2100%. A. 1123; A. 1126; A. 1139; A. 1227.

Meijer. Even putting aside the fact that this argument was not raised at trial, the Court of Appeals found that this damage theory was defective because there was no evidence that the business with Meijer was reasonably certain to occur. Amerinet never produced a copy of an alleged $1,000,000 order. And although Amerinet deposed Meijer employees, Amerinet elicited no testimony from any Meijer employee that Meijer intended to do any future business with Amerinet -- let alone business which would generate $1,000,000 in net profits.[5/] Nor was there any testimony from Meijer that the purported future business was shifted to another company or testimony that any conduct on the part of Xerox caused Amerinet to lose the alleged future business. There was not even any testimony that Meijer bought non-Xerox equipment from *anyone* in 1987. There was simply no evidence in the record to support Amerinet's claim.

Amerinet's damage theories were pure speculation and failed to pass muster under the undisputed Minnesota case law.[6/] The Court of Appeals' analysis does not in any way constitute a departure from the accepted and usual course of judicial proceedings.

5/ The alleged $1,000,000 order and other supposed lost Meijer business refer lost gross *revenue*, not lost net *profits* -- which at that time were approximately 1.6% of gross revenue.

6/ Amerinet's failure of proof on causation and damages were similarly fatal to the claim of business disparagement, which was dismissed at the summary judgment stage. 972 F.2d at 1503-4.

II.

THE COURT OF APPEALS, IN APPLYING THE UNDISPUTED STANDARDS FOR SUMMARY JUDGMENT TO THE RECORD IN THIS CASE, DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Court of Appeals' decision does not present a question of national economic importance or a departure from the accepted and usual course of judicial proceedings that warrants grant of a writ of certiorari. It does not raise questions about the legality of specific business practices. Both parties and the Court of Appeals agree that the governing law on the standard for grant of summary judgment is the law stated in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Amerinet argues that the Court of Appeals misapplied *Matsushita* and required "more persuasive evidence than otherwise necessary to survive summary judgment" because the claims in the Complaint made "no economic sense." In fact, the Court of Appeals, applying this Court's recent analysis of that question in *Eastman Kodak*, held specifically that *Matsushita* "did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases . . . . *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated in that decision." 972 F.2d at 1495, *quoting Eastman Kodak*, 112 S.Ct. at 2083.

A. The Insufficiency of Evidence of Causation and Damages

Because Amerinet's antitrust claims and its tort claims based on the Xerox FSMA both allege injury arising out of the same acts of Xerox, the total failure of proof of a causal link between those acts and any injury to Amerinet's business, discussed above in Section I-B, and the total failure of proof of a reasonable basis for quantifying any such injury, discussed above in Section I-C, required dismissal of the antitrust as well as the tort claims.

Amerinet suggests that the Court of Appeals erred in considering evidence that factors other than Xerox' alleged conduct were responsible for the destruction of its business. The Court of Appeals recognized that the cases draw a distinction between proof of the *fact* of damage (or causation) and proof of the *amount* of damage. 972 F.2d at 1493-5. Amerinet misconstrues that distinction; the Court of Appeals did not.

An antitrust plaintiff must establish that the defendant's conduct was a material cause of the plaintiff's alleged injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114, n.9 (1969). The Court of Appeals found that Amerinet failed to establish any direct evidence that Xerox' conduct was a material cause of injury to Amerinet. In the absence of direct evidence of causation, one may reasonably infer causation "from proof of defendant['s] wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, *not shown to be attributable to other causes. . . .*" *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (emphasis supplied). Since there was no direct evidence that Xerox' alleged conduct injured Amerinet, *Bigelow* required the Court of Appeals to consider whether such an inference was reasonable when the only direct evidence was that Xerox' conduct did *not* deter sales, A. 1046-7, and in light of the

overwhelming and undisputed evidence of alternative causes of the destruction of Amerinet's business. The Court of Appeals correctly held that no jury could reasonably infer that Xerox' conduct caused Amerinet's demise. 972 F.2d at 1495-6.

B. Amerinet's Tying Claims

Amerinet's petition does not raise questions about the definition of illegal tying arrangements. The applicable law is clear and well-established by recent decisions of this Court in *Eastman Kodak* and *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984).

Both parties and the Court of Appeals agree that there was no express tying arrangement between Xerox and its customers and that Xerox never refused to offer full service maintenance (the alleged "tying product") to anyone. In the absence of an express tie or a refusal to sell the tying product, an illegal tie may be found when "the only viable economic option" available to a buyer is to purchase both the tied and the tying product. *Nobel Scientific Industries v. Beckman Instruments, Inc.*, 670 F. Supp. 1313, 1324 (D. Md. 1986), *aff'd*, 831 F.2d 537 (4th Cir. 1987), *cert. denied*, 487 U.S. 1226 (1988). The only issue on the tying claims presented by Amerinet's petition is not a legal one, but whether, on the facts of this case, the Court of Appeals was correct in holding that Amerinet failed to produce sufficient evidence to support an inference that Xerox' maintenance policies made the purchase of new equipment from Xerox (the alleged "tied product") the "only viable economic option."

Amerinet's challenge to the Court of Appeals' ruling on the tying claims turns on the very same issue on which its challenge to the rulings on antitrust and tort causation turns: Was there direct evidence or a basis for a reasonable inference that Xerox' maintenance policies prevented customers from buying Amerinet's used

equipment? The absence of such evidence was fatal to Amerinet's attempt to establish a causal link between Xerox' conduct and the decline in its business. It is equally fatal to an argument that Xerox' maintenance policies made the purchase of used equipment less than a "viable economic option."

Amerinet tries to manufacture a legal issue on the tying claims by misreading the opinion of Court of Appeals as a deviation from the basic rule stated in *Jefferson Parish* and reiterated in *Eastman Kodak* that "an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, *or might have preferred to purchase elsewhere on different terms.*" *Eastman Kodak*, 112 S. Ct. 2080, n.9, *quoting Jefferson Parish*, 466 U.S. at 12 (emphasis supplied). The Court of Appeals did not, as Amerinet suggests, rewrite the law to condemn tying arrangements only when a buyer is forced to purchase an unwanted product and not when a buyer is forced to purchase a wanted product from a different source on different terms. In fact, when the Court of Appeals quoted the *Jefferson Parish* definition of tying it underscored the last clause of the definition. 972 F.2d at 1501.

What the Court of Appeals held was that the "overall message of *Jefferson*" is that tying arrangements are unlawful only when there is proof that the arrangements force "purchases that would not otherwise be made," 972 F.2d at 1501, *citing Jefferson Parish*, 466 U.S. at 27, or that the buyer is forced "to accept a deal . . . he or she would otherwise not have wanted." 972 F.2d at 1501. Applying that standard, the Court of Appeals held specifically that even if it accepted Amerinet's argument that a sale of used equipment at a lower price than new equipment was a sale "on different terms" within the meaning of the *Jefferson Parish* definition, Amerinet still had the burden of establishing the existence of a tie -- *i.e.*, that one or

more of Xerox' customers "might have preferred to purchase" from Amerinet "on different terms" but was prevented by Xerox from doing so. The Court of Appeals correctly held that Amerinet had failed to introduce evidence sufficient to support such a finding. 972 F.2d at 1501.

CONCLUSION

While every case may be important to its litigants, only a very small number of cases present the "special and important" reasons that merit discretionary review by the Supreme Court. *See* Supreme Court Rule 10.1; *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). This is not one of those cases. The petition for writ of certiorari should be denied.

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